



Control Number: 51812



Item Number: 201

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April 29, 2021

**Via Federal Express**

Mr. Thomas Gleeson  
Public Utility Commission of Texas  
701 Congress Avenue, 7<sup>th</sup> Floor  
Austin, Texas 78701

Re: Project No. 51812, *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Notice of Direct Appeal of DGSP2 LLC and Distributed Generation Solutions LLC and Alternative Unopposed Motion for Leave to Intervene in *Luminant Energy Co. LLC v. Pub. Util. Comm'n of Tex.*, 03-21-00108-CV, Mar. 8, 2021.

Dear Mr. Gleeson:

Pursuant to 16 Tex. Admin. Code § 22.22(b), enclosed is a courtesy copy of the Notice of Direct Appeal and Alternatively, Unopposed Motion for Leave to Intervene, that was filed today in the Court of Appeals for the Third Judicial District of Texas.

If you have any questions or concerns regarding the enclosed, please do not hesitate to contact my office.

Thank you for your attention to this matter.

Sincerely,

Chrysta Castañeda

Enclosures

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No. 03-21-00108-CV

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IN THE COURT OF APPEALS  
FOR THE THIRD JUDICIAL DISTRICT  
AUSTIN, TEXAS

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LUMINANT ENERGY COMPANY LLC,  
APPELLANT,  
V.  
PUBLIC UTILITY COMMISSION OF TEXAS  
APPELLEE.

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ON DIRECT APPEAL FROM THE PUBLIC UTILITY COMMISSION OF TEXAS  
PUC PROJECT NO. 51812

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**NOTICE OF DIRECT APPEAL OF  
DGSP2 LLC AND DISTRIBUTED GENERATION SOLUTIONS LLC  
AND ALTERNATIVE UNOPPOSED MOTION FOR LEAVE TO INTERVENE**

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TO THE HONORABLE THIRD COURT OF APPEALS:

Pursuant to Texas Utilities Code § 39.001(f), DGSP2 LLC (“DGSP2”) and Distributed Generation Solutions LLC (“DGS”) file this Notice of Direct Appeal and in the alternative, Unopposed Motion for Leave to Intervene in the above-captioned cause.

**I. NOTICE OF DIRECT APPEAL**

DGSP2 and DGS hereby file this Notice of Direct Appeal and state their intent to appeal competition rules issued by the Public Utility Commission of Texas (the

“Commission”) on February 21, 2021 in the *Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols* (“Order”) filed in Project No. 51812, styled *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*. See Exhibit A. Under Texas Utilities Code sections 39.001(e) and (f), this appeal of the validity of Commission competition rules is taken directly to the Court of Appeals for the Third District of Texas. Notice of this appeal is timely because the rules issued by the Commission in the Order are not yet published in the Texas Register. See Tex. Util. Code § 39.001(f) (challenges to the validity of competition rules must file notice of appeal not later than the 15<sup>th</sup> day after the date of publication in the Texas Register). Pursuant to Tex. Util. Code § 39.001(f), this is an expedited appeal.

## **II. ALTERNATIVE UNOPPOSED MOTION FOR LEAVE TO INTERVENE**

In the alternative, Appellants file this unopposed motion for leave to intervene.

### **A. Introduction**

On March 21, 2021, Appellant Luminant Energy Company LLC (“Luminant”) filed a notice of direct appeal in this cause, challenging the validity of rules issued by the Commission in the Order.

Section 39.001(f) of the Texas Utilities Code contemplates parties intervening in this Court, either in support of an appellant’s claims or in support of the challenged rule. DGSP2 and DGS seek to intervene as appellants because, like Luminant, they

challenge the validity of rules in the Order. In addition to providing Notice of Direct Appeal, DGSP2 and DGS file this alternative Motion for Leave to Intervene because there is no benefit to a multiplicity of appeals arising from the same order.

## **B. Background**

On February 15, 2021, The Electric Reliability Council of Texas (“ERCOT”) declared its highest state of emergency, an Energy Emergency Alert-3 (“EEA3”), because electric demand exceeded supply by an exceptional amount. Accordingly, ERCOT directed transmission operators in the ERCOT region to shed more than 10,000 megawatts (MW) of firm load.

On the same day, the Commission entered an emergency order in Project 51617, directing ERCOT “to ensure that firm load that was being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals” and to “**correct any past prices** such that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals.”

In a second order on February 16, 2021 in Project 51617, the Commission made a single change to the February 15 order, stating that “the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.”

The Commission's revocation of its original instructions to ERCOT was error, and Appellants have appealed it in No. 03-21-00098-CV before this Court. The Order in this cause is in conflict with applicable laws and regulations and the Commission's original February 15, 2021 Order in Project No. 51617. Because DGSP2 and DGS are market participants and owners of resources that were deployed during the EEA3 event, they are directly impacted by the competition rules that are the subject of the Order. *See* Exhibit B, Affidavit of Adam Sinn.

**C. Arguments and Authorities**

Intervention in this Court is expressly contemplated by Section 39.001(e) and (f) of the Texas Utilities Code. Tex. Util. Code § 39.001(f) ("appellant, and any person who is permitted by the court to intervene in support of the appellant's claims, shall file and serve briefs...."). *See also Low Income Consumers v. Pub. Util. Comm'n of Tex.*, No. 03-18-00364-CV, 2020 WL 2071753, at \*3 (Tex. App.—Austin Apr. 30, 2020, no pet.) (mem. op.) (noting intervention by a party challenging competition rule).

Because this appeal originated from a final decision by a state agency rather than a district court, some procedural gaps should be unsurprising, including the lack of an appellate rule that specifically governs intervention under these circumstances. *See* Tex. Util. Code § 39.001(f) (noting applicability of Texas Rules of Appellate Procedure to the extent they are not inconsistent with the statute). However, Texas

Rule of Civil Procedure 60 provides some guidance in this case. *See* Tex. R. Civ. P. 60 (“Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party”).<sup>1</sup>

Under Rule 60, courts have broad discretion to permit intervention. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). When reviewing a trial court’s decision to strike a plea in intervention, Texas appellate courts rely on a three part test. *Id.*; *Save Our Springs All., Inc. v. City of Kyle*, No. 03-13-00271-CV, 2014 WL 1432090, at \*1 (Tex. App.—Austin Apr. 10, 2014, no pet.). The Texas Supreme Court has held that a trial court abuses its discretion in striking a plea in intervention when (1) the intervenor could have brought the same action or any part thereof in its own name; (2) intervention will not complicate the case by an excessive multiplication of issues; and (3) intervention is almost essential to effectively protect the intervenor’s interest. *Id.* All of these factors are met here.

First, DGSP2 and DGS could have brought this action in their own names. As market participants and owners of resources deployed during the EEA3 event, DGSP2 and DGS are and continue to be directly affected by the Commission’s

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<sup>1</sup> Rule 60 does not require permission from the Court to intervene. DGSP2 and DGS file this motion pursuant to Tex. Util. Code § 39.001(f), which provides for intervention by “any person who is permitted by the court.”

competition rules and directives to ERCOT regarding pricing and settlement of financial obligations. Second, intervention will not complicate the case because DGSP2 and DGS complain of the same order as Luminant and rely on the same statute to perfect appeal. Third, review by appeal of the Order is necessary to protect intervenors' interests, because if this Court does not act to correct the error, the damage to their interests will go unremedied.

**D. Conclusion and Prayer**

For all of the foregoing reasons, DGSP2 and DGS respectfully request that the Court grant this motion and permit DGSP2 and DGS to participate as intervenors in this case.

**E. Certificate of Conference**

Counsel for DGSP2 and DGS has conferred with Counsel for Appellant and Appellee. Appellant takes no position on this intervention and Appellee is unopposed.



Respectfully submitted,

/s/ Chrysta Castañeda

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**ATTORNEYS FOR DGSP2 LLC  
AND DISTRIBUTED  
GENERATION SOLUTIONS LLC**

### **Certificate of Service**

The undersigned hereby certifies that a true and correct copy of foregoing has been served upon all counsel of record *via* ECF on April 29th, 2021.

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*/s/ Chrysta Castañeda*

Chrysta Castañeda

# EXHIBIT A



PROJECT NO. 51812

ISSUES RELATED TO THE STATE OF § PUBLIC UTILITY COMMISSION  
DISASTER FOR THE FEBRUARY 2021 §  
WINTER WEATHER EVENT § OF TEXAS

**ORDER DIRECTING ERCOT TO TAKE ACTION AND  
GRANTING EXCEPTION TO ERCOT PROTOCOLS**

Through this Order the Commission directs the Electric Reliability Council of Texas (ERCOT) to take certain actions and grants exception to provisions of the ERCOT Nodal Protocols and Operating Guides.

In an attempt to protect the overall integrity of the financial electric market in the ERCOT region, the Commission concludes it is necessary to authorize ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols to resolve financial obligations between a market participant and ERCOT. It is appropriate that ERCOT's discretion include, but not be limited to, ERCOT's ability to take the following actions:

- Deviate from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments;
- Utilize available funds, such as undistributed congestion revenue right auction revenues, to cover short-paying invoice recipients;
- Relax credit requirements and releasing cash or other collateral to provide short-term market-participant liquidity;
- Deviate from protocol requirements regarding the maximum amount of default uplift invoices;
- Suspend breach notifications to certain market participants for failure to make payment or provide financial security; and
- Produce reconciliation settlements following market stabilization.

PURA § 39.151(d)<sup>1</sup> gives the Commission complete authority over ERCOT, the independent organization certified by the Commission under PURA § 39.151. In addition, ERCOT is required to "administer settlement and billing for services provided by ERCOT, including assessing creditworthiness of market participants and establishing and enforcing

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<sup>1</sup> Public Utility Regulatory Act, Tex. Util. Code §§11.001-66.016.

reasonable security requirements in relation to their responsibilities under ERCOT rules.”<sup>2</sup> Further, ERCOT must perform any additional duties required by commission order.<sup>3</sup>

This order does not relieve market participants of payment or financial security obligations with ERCOT. Moreover, market participants remain liable for all charges associated with any activity related to its relationship with ERCOT and any expenses arising from the consequences of termination of a market participant’s agreements with ERCOT or revocation of the market participant’s rights to conduct activities with ERCOT.

### **I. Orders**

For the reasons discussed above, the Commission issues the following orders:

1. ERCOT must exercise its sole discretion to resolve financial obligations between a market participant and ERCOT as provided by this Order.
2. Any and all provision of the ERCOT Nodal Protocols are waived to the degree necessary to allow ERCOT to take the actions ordered herein.
3. ERCOT must report to the Commission twice each day, beginning February 22, 2021, of the the actions it has taken in response to this Order.
4. ERCOT must direct any questions regarding its obligations under this Order to the Commission’s Deputy Executive Director or her designee..

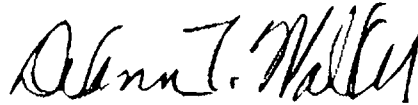
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<sup>2</sup> 16 Tex. Admin. Code § 25.361 (b)(2).

<sup>3</sup> *Id* § 25.361(b)(16).

Signed at Austin, Texas the 21st day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER



# **EXHIBIT B**

**AFFIDAVIT OF ADAM SINN**

**STATE OF TEXAS**

§

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**HARRIS COUNTY**

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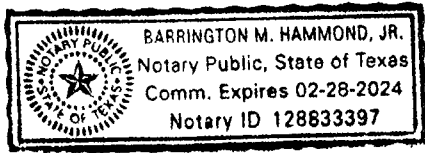
Before me, the undersigned notary, on this day personally appeared Adam Sinn, the affiant, whose identity is known to me. After I administered the oath, affiant testified as follows:

1. "My name is Adam Sinn. I am over 21 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
2. I have an ownership interest in DGSP2 LLC ("DGSP2") and Distributed Generation Solutions LLC ("DGS"). DGSP2 and DGS are generators of electricity on the ERCOT grid, market participants, and owners of resources that were deployed during the February 2021 Energy Emergency Alert (EEA) event affecting the ERCOT grid (the "Emergency").
3. DGSP2 and DGS were directly and negatively affected by the *Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules* issued by the Public Utility Commission on February 16, 2021, originally filed in Project No. 51617 and later refiled in Project 51812 ("Second Order"). The Second Order caused financial harm to DGSP2 and DGS, which were generating and selling electricity during the Emergency."

Further, Affiant sayeth naught.

  
\_\_\_\_\_  
Adam Sinn

Sworn to and subscribed before me, the undersigned Notary Public, on April 27, 2021.



*Barrington M. Hammond, Jr.*

Notary Public in and for  
The State of Texas

My commission expires: 2-28-2024